

TRIAL COURT OF THE COMMONWEALTH
SUPERIOR COURT

BARNSTABLE, ss

CIVIL ACTION: 1872CV661

JOHN W. SULLIVAN, TIMOTHY C.
DOYLE, and HERBERT J. SANDBERG,
Plaintiffs

v.

ROBERT J. POWERS AND VERONICA
A. POWERS, and ALEX RODOLAKIS,
JAKE DEWEY, HERBERT
BORDENSIEK, TODD WALANTIS, and
MARK HANSEN,
Defendants

COMPLAINT
(c. 40A §17)

1. The Plaintiff, John W. Sullivan, is an owner of the property of 700 Poponesset Road, Cotuit, (Barnstable) MA.
2. The Plaintiff, Timothy C. Doyle, is an owner of the property at 741 Poponesset Road, Cotuit, (Barnstable) MA.
3. The Plaintiffs, Herbert J. Sandberg is a resident and beneficial owner of the property at 721 Poponesset Road, Cotuit, (Barnstable) MA.
4. The Defendants, Robert J. Powers and Veronica A. Powers, are the owners of property at 760 Poponesset Road, Cotuit, (Barnstable) MA 02635.
5. The Defendants, Alex Rodolakis, Jake Dewey, Herbert Bordensiek, Todd Walantis and Mark Hansen, are the duly appointed and voting members of the Barnstable Zoning Board of Appeals, which Board has mailing addresses of:

Alex Rodolakis
1381 Main Street
Osterville, MA 02655

Jake Dewey
P.O. Box 614
Hyannisport, MA 02647

Herbert Bordensiek
58 Loomes Ln.
Centerville, MA 02632

Todd Walantis
P.O. Box 20
Cotuit, MA 02635

Mark Hansen
51 Joyce Anne Road
Centerville, MA 02632

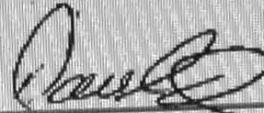
6. On or about June 7, 2018, the Defendants, Powers, filed with the Defendant Board of Appeals an application for a variance from the zoning ordinance of Barnstable, Section 240-14 and 240-36, seeking a variance from the minimum lot size requirements of the ordinance applicable to their property, in order to be allowed to subdivide their property into two (2) undersized lots, for residential development.
7. The Defendant Board caused notice of the Defendants' application and hearing scheduled therein to be posted, advertised and mailed to all parties in interest.
8. The Defendant Board opened and conducted a public hearing on the Defendants said application on July 25, 2018, September 26, 2018, October 10, 2018 and November 14, 2018.

9. At the said public hearings, the Plaintiffs each expressed their opposition to the proposed variance, either in writing, by personal comment, and/or by presentation by their legal counsel.
10. At the conclusion of the public hearing, the Defendant Board voted 4-1 to grant the variance to the Defendants as requested, with conditions.
11. The Board's decision was filed with the Barnstable Town Clerk on November 28, 2018 and an attested copy thereof is attached hereto as Exhibit A.
12. The Plaintiffs allege that they are each parties in interest to this application, being owner and/or residents of residential properties abutting or located directly across the street from the Powers' property, and having received notice of the said hearing from the Board.
13. The Plaintiffs allege that the Defendant Board exceeded its authority by granting said variance, the Board failed to make findings of fact which support the granting of a variance, and as the facts presented did not warrant the findings necessary to support such a variance, pursuant to G.L. c. 40A §10 or zoning ordinance section 240-125 (B)(1)(c) and/or 240-126.
14. The Plaintiffs allege that they are aggrieved by said decision of the Board, because, *inter alia*, the variance would permit excessive development of the Defendants' property and result in over development of the neighborhood, in direct contravention of the interest and purpose of applicable zoning ordinance and to the detriment of their respective properties.

Wherefore, the Plaintiffs request that this Honorable Court find that the decision of the Defendant Board exceeded its lawful authority, vacate said decision, and enter such other and further relief as may be deemed just and proper.

Respectfully Submitted,
John W. Sullivan,
Timothy C. Doyle,
Herbert J. Sandberg

By Their Attorney,



David S. Reid, Esq., BBO#41540
1292 Route 28
South Yarmouth, MA 02664
508-394-5648
DSReid@Verizon.net

A TRUE COPY ATTEST

Alex M. Quirk

P651-7

Town Clerk
BARNSTABLE

Town of Barnstable
Zoning Board of Appeals
Decision and Notice

BARNSTABLE
TOWN CLERK



Variance No. 2018-036 - Powers

18 NOV 28 P2:41

Section 240-36 - Resource Protection Overlay District

To allow the division of one parcel into two parcels that will not meet the 2 acre minimum requirement

Summary:	Granted with Conditions
Petitioner:	Robert and Veronica Powers
Property Address:	760 Popponessett Road, Cotuit, MA
Assessor's Map/Parcel:	006/046
Zoning District:	Residence F Zoning District
Hearing Date:	November 14, 2018
Recording Information:	Book: 12635 Page: 278 Plan Book: 19 Page: 143

Background

Robert J. and Veronica A. Powers petitioned for a Variance pursuant to Section 240-36 Resource Protection Overlay District (RPOD) and Section 240-14 Residence F (RF) Zoning District. The petitioners sought relief from the minimum lot size requirement to divide their lot into Lot 1 and Lot 2. The proposed Lot 1 will have approximately 45,230 square feet of upland and the proposed Lot 2 will have approximately 43,600 square feet of upland where 2 acres is required. The subject property is located at 760 Popponessett Road, Cotuit, MA as shown on Assessor's Map 006 Parcel 046. It is located in the Residence F (RF) Zoning District and the Resource Protection Overlay District (RPOD).

In 2001, the Planning Board approved a plan for the combination of what were then three lots, held in common ownership, re-divided into two lots. Subsequently, the engineering company failed to record the Definitive Plan within the statutory requirement and the Definitive Plan became invalid and not in conformance to the current RF/RPOD Zoning District.

The subject property is a 2.80 acre, rectangular shaped lot with frontage on Popponessett Road in Cotuit. It is located in the single-family residential area with generally one acre lots, Fullers Marsh to the south and east, and Santuit Road to the north. Popponessett Road is unimproved at this location. The subject property is improved with a 6,084 gross square foot (2,942 square foot living area), three-bedroom, single-family dwelling, constructed in 2001. It is a two and half story Colonial style dwelling with an attached two car garage. The dwelling is on a septic system and is presumed to be connected to town water.

Proposal & Hearing Summary

Variance No. 2018-036 for relief from the minimum lot size requirement to divide their lot into Lot 1 and Lot 2 at 760 Popponessett Road, Cotuit, MA was filed at the Town Clerks office and the office of the Zoning Board of Appeals on June 7, 2018. A Public Hearing before the Zoning Board of Appeals was duly advertised and notice sent to all abutters and interested parties in accordance with M.G.L. Chapter 40A. The hearing was opened on July 25, 2018 and continued to September 26, 2018, October 10, 2018 and to November 14, 2018 at which time the Board found to grant the variance subject to conditions. Board members deciding this appeal were: Alex Rodolakis, Herbert Bodensiek, Jake Dewey, Todd Walantis and Mark Hansen.

Mr. and Mrs. Powers represented themselves before the Board with assistance from Ariene Wilson, from A.M. Wilson and Associates. Also present was Richard L'Heureux from CapeSurv.

At the July 25, 2018, the applicants reviewed the permitting history of the lot(s) and the reason they are seeking a variance now. Mr. Powers argued that one acre of upland fits into the neighborhood and the wetlands bisecting the property make this a unique situation. He stated it is impossible to use this as one lot. Mr. Powers stated the hardship is financial and he and his wife need to be in a one-level dwelling for health and safety reasons. Ms. Wilson stated that the nitrogen loading could be much worse if a property owner constructs a 12 bedroom dwelling on the lot instead of the proposed 2-bedroom dwelling. Mr. Powers stated the engineering company failed to record the approved Planning Board plan within the statutory time required. He did state that after a legal battle, he was compensated for the engineering firm's failure to act. At the September 26, 2018 Hearing, the Applicants requested a continuance. At the October 10, 2018 hearing, letters from the public were discussed and the Board discussed possible construction restrictions on the vacant lot. The Board requested the Applicants and Staff draft conditions to restrict development.

At the November 14, 2018 hearing, the Board Chair reviewed the drafted conditions.

The Board Chair requested public comment. Attorney David Reid, representing the Sullivan Family, spoke in opposition of the variance. He submitted documents and reviewed them for the Board. He pointed out that the applicants had not received approval from the Planning Board in 1999. He stated that lot size is not a basis for a variance and questioned the hardship. Attorney Reid pointed out that the applicants were compensated for the failure to act. He stated this variance is not a benefit to the neighborhood and the abutters do not want the road upgraded. He concluded that this petition does not meet the criteria for a variance.

Arlene Wilson, environmental specialist, explained the reason for the RPOD and that this land is burdened by a wetland in the middle of the lot. She stated conditions affecting this drainage easement are unique to this lot. She stated the hardship is that the applicants cannot construct an addition to their existing dwelling due to setback to wetlands requirements. Ms. Wilson stated that the Ordinance allows for a 12-bedroom dwelling to be constructed on site along with accessory structures. The potential development could be double the nitrogen loading.

Pam Howell spoke of concerns over changes to the natural setting. She believes the current dwelling could be modified to meet the applicant's needs.

The Board received letters of support from William Miller, Robert Pontifex, Robert Benedetto, Christopher Dooley, Dianne and Larry Rhude, Mary and John Donovan, Alicia and Stephen Furrer.

The Board received letters of opposition from Pam and Mark Howell, Herbert and Harriet Sandberg, Margaret Bernard, Joe Sullivan, and Timothy Doyle.

Findings of Fact

At the hearing on November 14, 2018, the Board voted and made the following findings of fact in Variance No. 2018-036, relief from the minimum lot size requirement to divide their lot into Lot 1 and Lot 2 at 760 Popponessett Road, Cotuit:

1. Owing to circumstances related to soil conditions, shape, or topography of such land or structures and especially affecting such land or structures but not affecting generally the zoning district in which it is located. The Board found the lot to be unique due to the existence of the drainage easement which bisects the buildable area of the lot.
2. A literal enforcement of the provisions of the zoning ordinance would involve substantial hardship, financial or otherwise to the petitioner. The Board found there to be economic hardship should there be a literal enforcement of the Ordinance.

3. Desirable relief may be granted without substantial detriment to the public good and without nullifying or substantially derogating from the intent or purpose of the zoning ordinance. The Board found that by limiting the size of the dwellings and further structures both on proposed Lot 1 and Lot 2 would not be substantially detrimental to the neighborhood especially given the size of an as of right structure and additional structures that would otherwise be permissible on the existing lot.

The vote to accept the findings was:

AYE: Alex Rodolakis, Jake Dewey, Todd Walantis and Mark Hansen

NAY: Herbert Bodensiek found the petition does not meet the criteria for a variance

Decision

Appeal No. 2018-036, a request for relief from the minimum lot size requirement to divide their lot into Lot 1 and Lot 2 at 760 Popponessett Road, Cotuit, has been granted subject to the following conditions:

Lot 1 (vacant lot)

1. Minimum northerly side yard setback shall be 50 feet and will be planted and maintained with native vegetation.
2. No more than two bedroom dwelling shall be constructed.
3. Maximum height of the dwelling shall be 1 ½ stories.
4. Vegetated area shall be free of fertilizer, herbicides, and pesticides.
5. The garage shall be no larger than to accommodate 2 cars.
6. The maximum building footprint shall be 2,500 square feet including the garage.
7. There shall be no exterior construction before 8:00 a.m. or after 5:00 p.m. except in case of an emergency. There shall be no construction on Sunday or holidays except for emergencies.
8. There shall be no short term rentals of less than six months.

Lot 2 (house lot)

9. The current development on this lot shall represent full buildout. Further expansion of the dwelling or construction of additional accessory structures is prohibited without prior approval from the Board.

General

10. Variance No. 2018-036 is granted to Robert J. and Veronica A. Powers, to allow the division of one parcel into two separate nonconforming parcels at 760 Popponessett Road, Cotuit MA.

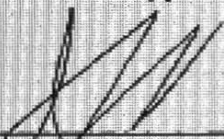
11. The division of land shall be in substantial conformance with the plan entitled "Plan of Land at 760 Popponessett Road, Barnstable (Cotuit), Mass" prepared for Robert J & Veronica Powers dated May 29, 2018 drawn by CapeSurv.
12. No further division of land shall be permitted without approval from the Board.
13. This decision shall be recorded at the Barnstable County Registry of Deeds and copies of the recorded decision shall be submitted to the Zoning Board of Appeals Office and the Building Division prior to issuance of a building permit. The rights authorized by this variance must be exercised within one year, unless extended.

AYE: Alex Rodolakis, Jake Dewey, Todd Walantis and Mark Hansen

NAY: Herbert Bodensiek found the petition does not meet the criteria for a variance

Ordered

Variance No. 2018-036 for relief from the minimum lot size requirement to divide their lot into Lot 1 and Lot 2 at 760 Popponessett Road, Cotuit has been granted with conditions. This decision must be recorded at the Barnstable Registry of Deeds for it to be in effect and notice of that recording submitted to the Zoning Board of Appeals Office. The relief authorized by this decision must be exercised within one year unless extended. Appeals of this decision, if any, shall be made pursuant to MGL Chapter 40A, Section 17, within twenty days after the date of the filing of this decision, a copy of which must be filed in the office of the Barnstable Town Clerk.



Alex Rodolakis, Chair

March 28, 2018

Date Signed

I, Ann Quirk, Clerk of the Town of Barnstable, Barnstable County, Massachusetts, hereby certify that twenty (20) days have elapsed since the Zoning Board of Appeals filed this decision and that no appeal of the decision has been filed in the office of the Town Clerk.

Signed and sealed this _____ day of _____ under the pains and penalties of perjury.

Ann Quirk, Town Clerk

Zoning Board of Appeals (ZBA) Abutter List for Map & Parcel(s): '006046'

Parties of interest are those directly opposite subject lot on any public or private street or way and abutters to abutters. Notification of all properties within 300 feet ring of the subject lot.

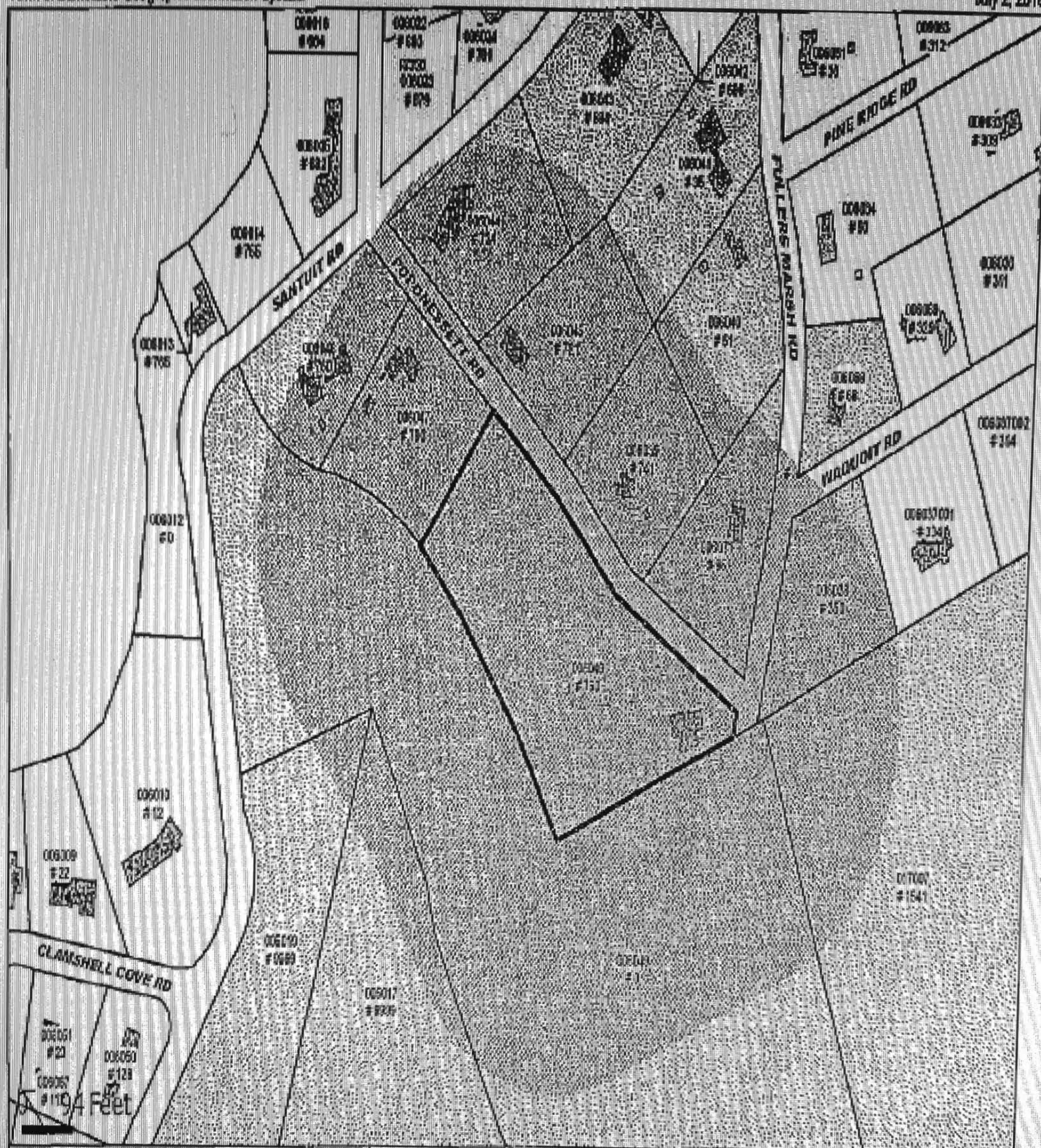
Total Count: 16



Close

Map & Parcel	Owner1	Owner2	Address1	Address 2	Mailing City/State/Zip	Country Deed
005017	BARNSTABLE, TOWN OF (CON)	CONSERVATION COMMISSION	200 MAIN STREET		HYANNIS, MA 02601	NONE
005019	BARNSTABLE, TOWN OF (CON)	CONSERVATION COMMISSION	200 MAIN STREET		HYANNIS, MA 02601	6685/179
006038	WALSH, WILLIAM & ANN		8 JANICE RD		CANTON, MA 02021	20801/311
006039	DOYLE, TIMOTHY C & KATHLEEN M		PO BOX 6046		LAWRENCEVILLE, NJ 08648	6647/94
006040	DOOLEY, CHRISTOPHER G		3 WIGHT LANE		WESTWOOD, MA 02090	25971/188
006041	FORBUSH, JAMES & KIRSTEN		16 LITTLE POND ROAD		NORTHBOROUGH, MA 01532	28418/49
006043	FURRER, ALICIA NYE CROWELL & STEPHEN A		694 SANTUIT RD		COTUIT, MA 02635	14911/177
006044	CAPOZZI, VINCENT & KAREN TRS	724 SANTUIT ROAD COTUIT REALTY TRUST	8 ZITO DRIVE		SAUGUS, MA 01906-3234	30430/86
006045	SURRE, LAUREN S & GUNTHER, DAVID H TRS		250 HAMMOND POND PONY		CHESTNUT HILL, MA 02467	29835/57
006046	POWERS, ROBERT J & VERONICA A		760 POPONNESSETT RD		COTUIT, MA 02635	12635/270
006047	SULLIVAN, DANIEL P		700 POPONNESSETT ROAD		COTUIT, MA 02635	28787/58
006048	BACON, JOHN C & RAMUTA H		750 SANTUIT RD		COTUIT, MA 02635	4049/315
006049	BARNSTABLE, TOWN OF (CON)	CONSERVATION COMMISSION	200 MAIN STREET		HYANNIS, MA 02601	1415/72
006068	KOENIGSBERG, JEDEDIAH & FERGUSON, CHRISTI		47 MILFORD ST # 1		BOSTON, MA 02118	30583/174
006071	SIMPSON, CRAIG		425 GALLIVAN BLVD		DORCHESTER CTR, MA 02124-5230	8232/6
017007	NEW RUSHY MARSH REALTY LLC		1500 MAIN STREET		COTUIT, MA 02635	01312862

This list by itself does NOT constitute a certified list of abutters and is provided only as an aid to the determination of abutters. If a certified list of abutters is required, contact the Assessing Division to have this list certified. The owner and address data on this list is from the Town of Barnstable Assessor's database as of 7/2/2018.



DISCLAIMER: This map is for planning purposes only. It is not a legal survey or a boundary determination or regulatory interpretation. Enforcement beyond a scale of 1"=100' may not meet established map accuracy standards. The parcel lines on this map are any graphic representation of Assessor's lot parcels. They are not true property boundaries and do not represent accurate relationships to physical features on the map such as building locations.

Map 005 Parcel 048 Zoning Board of Appeals (ZBA)

Adjacent Lot Type - Parties of interest are those directly opposite subject lot on any public or private street or way and adjacent to abutters. Notification of all properties within 200 foot ring of the subject lot.

Selected Parcel
Abutters
Buffer



Town of Barnstable
Zoning Board of Appeals
Notice of Public Hearings under the Zoning Ordinance
July 25, 2018

To all persons interested in or affected by the actions of the Zoning Board of Appeals, you are hereby notified, pursuant to Section 11 of Chapter 40A of the General Laws of the Commonwealth of Massachusetts and all amendments thereto, that a public hearing on the following appeals will be held on Wednesday, July 25, 2018, at the time indicated:

7:00 PM - Appeal No. 2018-038

Powers

Robert J. and Veronica A. Powers have petitioned for a Variance pursuant to Section 240-36 Resource Protection Overlay District (RPOD) and Section 240-14 Residence F (RF) Zoning District. The petitioners are seeking relief from the minimum lot size requirement to divide their lot into Lot 1 and Lot 2. The proposed Lot 1 will have approximately 45,293 square feet of upland and the proposed Lot 2 will have approximately 43,600 square feet of upland where 2 acres is required. The subject property is located at 760 Popponesset Road, Cotuit, MA as shown on Assessor's Map 008 Parcel 048. It is located in the Residence F (RF) Zoning District and the Resource Protection Overlay District (RPOD).

These public hearings will be held at the Barnstable Town Hall, 357 Main Street, Hyannis, MA, Hearing Room located on the 2nd floor, Wednesday, July 25, 2018. Plans and applications may be reviewed at the Zoning Board of Appeals Office, Planning and Development Department, Town Offices, 200 Main Street, Hyannis, MA.

Barnstable Patriot

July 6, 2018 and July 13, 2018

Alex Rodolakis, Chair

Zoning Board of Appeals

Town of Barnstable
Zoning Board of Appeals
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Barnstable Patriot

July 6, 2018 and July 13, 2018

Alex Rodolakis, Chair

Zoning Board of Appeals

CIVIL ACTION COVER SHEET	TRIAL COURT OF MASSACHUSETTS SUPERIOR COURT DEPARTMENT		DOCKET NO. <u>1872CV6661</u>
	COUNTY OF BARNSTABLE		
PLAINTIFF(S) <u>John W. Sullivan, Timothy C. Doyle, Herbert J. Sandberg</u>		DEFENDANT(S) <u>Robert J. Powers, Veronica A. Powers, Alex Rodolakis, Jake Dewey, Herbert Bordensiek, Todd Walantis, Mark Hansen</u>	

Type Plaintiff's Attorney name, Address, City/State/Zip
Phone Number and BBO#

Type Defendant's Attorney Name, Address, City/State/Zip
Phone Number (if known)

David S. Reid, Esq.
1292 Route 28
South Yarmouth MA 02884
508-394-5648
BBO 415540

**SUPERIOR COURT
BARNSTABLE, SS**
FILED DEC 05 2018

Sarah M. Nolan Clerk

TYPE OF ACTION AND TRACK DESIGNATION (See reverse side)			
CODE NO.	TYPE OF ACTION (specify)	TRACK	IS THIS A JURY CASE?
	C02 Zoning Appeal G L c 40A - Fast Track		<input type="radio"/> Yes <input checked="" type="radio"/> No

The following is a full, itemized and detailed statement of the facts on which plaintiff relies to determine money damages. For this form, disregard double or treble damage claims; indicate single damages only.

TORT CLAIMS

(Attach additional sheets as necessary)

A. Documented medical expenses to date:

1. Total hospital expenses
2. Total doctor expenses
3. Total chiropractic expenses
4. Total physical therapy expenses
5. Total other expenses (describe)

\$ _____
\$ _____
\$ _____
\$ _____
\$ _____
\$ _____
\$ _____
\$ _____
\$ _____
\$ _____

Subtotal

- B. Documented lost wages and compensation to date**
C. Documented property damages to date
D. Reasonably anticipated future medical expenses
E. Reasonably anticipated lost wages and compensation to date
F. Other documented items of damages (describe)

\$ _____

G. Brief description of plaintiff's injury, including nature and extent of injury (describe)

Total \$ _____

CONTRACT CLAIMS

(Attach additional sheets as necessary)

Provide a detailed description of claim(s):

TOTAL \$ _____

PLEASE IDENTIFY, BY CASE NUMBER, NAME AND COUNTY, ANY RELATED ACTION PENDING IN THE SUPERIOR COURT DEPARTMENT

I hereby certify that I have complied with the requirements of Rule 5 of the Supreme Judicial Court Uniform Rules on Dispute Resolution (SJC Rule 1:18) requiring that I provide my clients with information about court-connected dispute resolution services and discuss with them the advantages and disadvantages of the various methods.

Signature of Attorney of Record
A.G.S.C. 3-2007

Date: 12/5/18